



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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Doug Domenech
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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
VA Timberline, LLC
FOR
Lawnes Point Subdivision
Permit No. WP4-04-2205**

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and § 62.1-44.15(8d), between the State Water Control Board and VA Timberline, LLC for the purpose of resolving certain violations of State Water Control Law and the applicable permit and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Barking Tree Frog" means *Hyla gratiosa*, a state threatened species and the largest Virginia native tree frog.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "DGIF" means the Department of Game and Inland Fisheries, an agency of the Commonwealth of Virginia.

5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
7. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorized activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise served as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344. VA Timberline was issued a General Permit Authorization No. WP4-04-2205 on July 21, 2005 which expired on July 20, 2010.
8. "Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.
9. "Property" means the tract of land, approximately 1300 acres, owned by VA Timberline, LLC, located approximately 25 miles northwest of Smithfield, Virginia, adjacent to Lawnes Creek and the James River in Isle of Wight County, Virginia.
10. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
11. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.14:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
12. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
13. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia.
14. "USACE" means the United States Army Corps of Engineers.
15. "Va. Code" means the Code of Virginia (1950), as amended.
16. "VAC" means the Virginia Administrative Code.
17. "VA Timberline" means VA Timberline, LLC, certified to do business in Virginia, and its affiliates, partners, subsidiaries, and parents.

18. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. VA Timberline, a person pursuant to 9 VAC 25-210-10, owns the Property. VA Timberline constructed a 155 lot residential subdivision with lots ranging from 2 to 5 acres on the Property. Lawnes Creek and several unnamed tidal tributaries to Lawnes Creek, all of which are surface waters, run through the Property. Lawnes Creek is a tributary to the James River, also a surface water. The Property contains uplands as well as forested nontidal wetlands which are surface waters of the Commonwealth.
2. The Permit required VA Timberline to provide a Barking Tree Frog Habitat Creation/Preservation Plan ("Plan"), to be approved by DEQ and DGIF, because of DGIF concerns that existing potential barking tree frog habitats adjacent to the Property access roads might be compromised. The Permit required compliance with the approved Plan.
3. DEQ and DGIF approved the Plan on August 30, 2005. The Plan included construction specifications and a monitoring timeline with detailed habitat creation requirements including vegetation and hydrological criteria to ensure the creation of the ecological functions necessary to support the barking tree frog. In addition, the Plan included the preservation of the habitat creation areas and surround area through protective signage and a restrictive instrument in the chain of title.
4. During a July 19, 2006 inspection of the Property, it was observed that the barking tree frog habitat creation areas were not vegetated and no plantings had occurred. VA Timberline stated that planting was to be delayed until the next growing season (spring 2007). DEQ and DGIF accepted this delay.
5. During a DEQ Permit file review in August 2008, it was noted that reports required by the Plan had not been received since June 2007. Upon inquiry, DEQ received correspondence from a consultant, on behalf of VA Timberline, stating that restoration had not been completed regarding the Plan since submittal of the June 6, 2007 monitoring report. The monitoring to be conducted in April or May 2008 had not been completed and the subsequent report had not been submitted. Additionally, the file review showed that DEQ had not received proof of recordation of the DEQ-approved restrictive instrument in the property's chain of title, or proof that the required protective signage has been installed at the barking

tree frog conservation area as required by the Permit.

6. Va. Code § 62.1-44.15:20 states that except in compliance with VWP permit, it is unlawful to excavate in a wetland, or conduct the following activities in a wetland: (b) filling or dumping...(d) new activities that cause significant alteration or degradation of existing wetland acreage or functions. Similarly, 9 VAC 25-210-50 (A) states that except in compliance with a permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical, or biological properties of surface waters, including wetlands. 9 VAC 25-210-90(A) requires the Permittee to comply with all conditions of the Permit.
7. On September 9, 2008 DEQ issued Notice of Violation No. W2008-09-T-001 to VA Timberline for noncompliance with the Plan and the Permit. The Notice of Violation also included noncompliance with a Special Order by Consent effective December 7, 2007 ("2007 Order") for failing to restore unpermitted impacts to 0.6 acres of wetlands on the Property. The restoration was completed in December 2010. The 2007 Order was terminated on December 20, 2010.
8. On September 30, 2008 the consultant submitted a report for the monitoring completed on August 29 and September 4, 2008. This monitoring report covered the August 2008 Plan requirement.
9. On October 9, 2008 DEQ enforcement staff met on-site with representatives from VA Timberline, the consultant, and an attorney for VA Timberline, discussed the Notice of Violation, and visited each of the four barking tree frog habitat creation areas. During the site visit, it was observed that the physical structure of the ponds appeared satisfactory. However, there also appeared to be deficiencies in wetland vegetation and hydrology at each of the barking tree frog habitat creation areas. It was noted that protective signage had recently been put in place. The restrictive instrument in the chain of title had not been recorded.
10. On October 16, 2008 VA Timberline submitted a Corrective Action Plan (CAP) for the barking tree frog habitat creation areas. DEQ, in agreement with DGIF, approved the CAP on October 31, 2008 with the condition that monitoring be extended through 2010, as provided in the original Plan.
11. VA Timberline recorded the declaration of restrictions required by the Permit in the Isle of Wight County clerk's office on November 20, 2008. DEQ received proof of recordation on January 6, 2009.
12. DEQ received spring, summer, and fall 2009 monitoring reports that indicated the four barking tree frog habitat creation areas were ongoing and showing success.

13. On April 8, 2010 DEQ Staff met with VA Timberline on the Property and inspected the four barking tree frog habitat creation areas. During the inspection, it was observed that the four tree frog habitat creation areas were continuing to show success.
14. On August 13, 2010, DEQ received the final monitoring report for the four barking tree frog habitat creation areas. The report indicated that the vegetation and hydrology at each area had been established as required by the 2008 CAP. DEQ forwarded the final monitoring report to DGIF, and by email dated September 30, 2010, DGIF agreed that the four barking tree frog habitat creation areas met the success criteria and no further work was needed.
15. Based on the results of August 2008 file review, the October 9, 2008 on-site meeting, and the documentation submitted on October 16, 2008, the Board concludes that VA Timberline has violated the Permit, Va. Code § 61.1-44.15:20, and 9 VAC 25-210-50, as described in paragraph C(5) through C(9) above.
16. DEQ staff inspected the facility on April 8, 2010 and documentation was submitted on August 13, 2010 and September 30, 2010 that verifies that the violations described in paragraphs C(5) through C(9), above, have been corrected.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders VA Timberline, and VA Timberline agrees to pay a civil charge of \$2,500.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

VA Timberline shall include its Federal Employer Identification Number (FEIN) 06-1556930 with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of VA Timberline for good cause shown by VA Timberline, or on its own motion

pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.* after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, VA Timberline admits the jurisdictional allegations and agrees not to contest, but does not admit, the findings of fact, and conclusions of law contained herein.
4. VA Timberline consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. VA Timberline declares it has received fair and due process under the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by VA Timberline to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. VA Timberline shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. VA Timberline shall show that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. VA Timberline shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee, and VA Timberline. Nevertheless, VA Timberline agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until in effect until:
 - a. The Director or his designee terminates the Order after VA Timberline has completed all of the requirements of the Order;
 - b. VA Timberline petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
 - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to VA Timberline.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve VA Timberline from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by VA Timberline and approved by the Department pursuant to this Order are

incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of VA Timberline certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind VA Timberline to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of VA Timberline.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, VA Timberline voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 25 day of June, 2012.

Asia D. Hill
Regional Director
Department of Environmental Quality

VA Timberline, LLC voluntarily agrees to the issuance of this Order.

Date: April 16, 2012 By: *[Signature]* Authorized Agent
(Person) (Title)
VA Timberline, LLC

Commonwealth of Massachusetts
City/County of Berkshire

The foregoing document was signed and acknowledged before me this 16th day of April, 2012, by Timothy D. Smith who is Authorized Agent of VA Timberline, LLC on behalf of the company.

[Signature]
Notary Public

Registration No.

My commission expires: Oct 7, 2016

Notary seal:

